IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 2308 of 1985

For Approval and Signature:

HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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M M SHETH - Petitioner
Versus
A M C & 1 - Respondents

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Appearance :
MR SHAILESH C PARIKH for Petitioner.
MR PRASHANT G. DESAI for Respondent(s) : 1,
None for Respondent No. 2.

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CORAM : HONOURABLE MR.JUSTICE K.A.PUJ

Date : 13/12/2005

ORAL JUDGMENT

1.The petitioner has filed this petition under Article 226 of the Constitution of India praying for declaration that the decision of the Standing Committee of the respondent – Corporation to terminate the services of the petitioner is illegal, arbitrary, unreasonable and violative of Articles 14 & 16 of the Constitution of India and further praying for quashing and setting aside the same. The petitioner has also prayed for reinstatement in service with full back wages and with all other consequential benefits.

2.This petition was admitted on 27.03.1985. It was decided by this Court on 18.10.1996 whereby the petition was dismissed. The said dismissal order was challenged by the petitioner in

L.P.A. No. 870 of 1997 on the ground that the said order was passed without hearing the petitioner. The Division Bench of this Court has, therefore, allowed the appeal and quashed and set aside the order passed by the Learned Single Judge after hearing Mr. Shailesh Parikh for the appellant and Mr. Prashant G. Desai for the respondent - Corporation. The Division Bench has directed the office to place the matter before the Learned Single Judge and also made it clear that the Court has not gone into the merits of the matter and the Learned Single Judge will decide the matter on its own merits.

3.It is the case of the petitioner that the petitioner entered on the services of the respondent Corporation on 11.09.1971. From 11.09.1971 to 30.04.1979, he worked in the health department and thereafter, he was transferred to Octroi Department in which he was working since 01.05.1979 until 30.09.1984

when his services were terminated. It is also the case of the petitioner that the petitioner's services were brought to an end on the ground that he was found sleeping at 12.30 p.m. on 30.01.1980 during his night shift at Memnagar Octroi post. The petitioner has continuously served the respondent Corporation for 13 years and during his long service record of 13 years, once on earlier occasion, he was absent without leave for one day for which he was served with a show cause notice and the present incident, otherwise the petitioner's service record was absolutely clean and without any blemish.

4.The petitioner was served with the Charge-sheet dated 07.04.1980 by which he was charged with the misconduct of sleeping during his duty on 30.01.1980 while he was posted at Memnagar Octroi post and thereby caused one Truck to pass unchecked. The petitioner submitted his

explanation stating the circumstances in which the said incident had occurred. Thereupon, the Corporation had instituted an inquiry and the Inquiry Officer submitted his report dated 25.08.1983 wherein the charge levelled against the petitioner was found to be proved. The Inquiry Officer relied upon the statement of the petitioner and on the basis of such statement, he found the petitioner guilty of the misconduct charged against him.

5.Thereafter, the Dy. Municipal Commissioner (Administration) accepting the finding of the Inquiry Officer issued a second show-cause notice dated 25.08.1983 to the petitioner calling upon him to show cause as to why he should not be dismissed from service. Since the petitioner was on leave because of personal and family reason, he could not tender his reply to the said show-cause notice. The petitioner was thereafter served with the

termination order dated 29.09.1984 passed by the Dy. Municipal Commissioner (Administration) dismissing the petitioner from service w.e.f. 01.10.1984.

6.Being aggrieved by the said order, the petitioner preferred an appeal dated 29.10.1984 to the Chairman of the Standing Committee under Section 56 (4) of the B.P.M.C. Act. The Standing Committee vide its Resolution No. 1799 dated 27.02.1985 converted the said order of dismissal passed by the Dy. Municipal Commissioner (Administration) into one of removal from service and the said decision was conveyed to the petitioner by the Municipal Commissioner vide his letter dated 01.03.1985.

7.Being aggrieved by the said decision of the Standing Committee, the petitioner has filed the present petition.

8.Mr. Shailesh C. Parikh, learned advocate appearing for the petitioner has submitted that though the petitioner could not reply to the second show-cause notice against the proposed punishment of dismissal, the punishing authority, however, was under an obligation to consider all the relevant and material factors – including the extenuating circumstances before inflicting the drastic punishment of dismissal. The only charge levelled against the petitioner was that he was found sleeping at night during duty hours and thereby caused one Truck to pass unchecked through the Octroi post. The goods carried by the Truck were liable to octroi duty of Rs. 25/-. He has further submitted that the night duty from 10.00 p.m. to 06.00 a.m. was unusual and unnatural in the sense that one has to keep himself awake against the natural tendency of sleep. It some times so happens that despite all efforts, sleep at times over-comes the

person for a few moments. Such casual moments are not uncommon for employees working in night duties and, therefore, must not constitute a serious misconduct so as to warrant dismissal or removal of an employee from the service. He has further submitted that when such lapse has happened once in his whole service career, the respondent – Corporation should not have treated it as a serious misconduct and to inflict extreme penalty of removal from the service. He has further submitted that punishment by way of termination of service should be resorted to as an extreme measure for gross misconduct and not otherwise. It is one of the basic principles of justice and fair play that the punishment should be commensurate with the degree of misconduct and if it is disproportionately excessive or harsh, it becomes illegal and unconstitutional.

9.In support of his submissions, Mr. Parikh has

relied on the decision of this Court in the case of *R.M. Parmar V/s. Gujarat Electricity Board, Baroda, 1982 (1) G.L.R. 352* wherein the Court has held that the matter regarding imposition of penalty on employees could not be left 'solely' to the 'discretion of the management' even if the employee concerned is found to be guilty of the charge levelled against him, presumably because of the conditioned approach of the Disciplinary Authority with his inbuilt and inherent pro-employer anti-employee bias. That is why in obeisance to the felt needs of time it was considered necessary to entrust this most vital function to a neutral body. It is a benevolent power conferred on the Labour Court and has to be exercised in the spirit in which the provision has been enacted in order to further the intendment and purpose of the legislation, keeping aglow before the mental eye some very important dimensions of the matter. The Court

while laying down such dimensions, has also enumerated the factors to be taken into consideration. The Court has made it very clear that it is not expedient in the interest of the administration to visit every employee against whom a fault is established with the penalty of dismissal and to get rid of them. It would be counter productive to do so for it would be futile to expect to recruit employees who are so perfect that they would never commit any fault. The Court has further held that it cannot be overlooked that by and large it is because the maximum penalty is imposed and total ruination stares one in the eyes that the employee concerned is obliged to approach the Court and avail of the costly and time-consuming machinery to challenge in desperation the order passed by the Disciplinary Authority. If a lesser penalty was imposed, he might not have been obliged to make recourse to costly legal proceedings which result in loss of

public time and also result in considerable hardship and misery to the employee concerned.

10.Mr. Parikh has further relied on the decision of this Court in the case of *Bhimsing Sardarsing V/s. District Supdt. Of Police & Ors., [1982] 23 (2) G.L.R. 410* wherein the principles laid down in R.M. Parmar V/s. G.E.B. (Supra) were reiterated and the Court has directed the Disciplinary Authority to reinstate the petitioner without back wages and with continuity of service. The Court has further observed that it would be right and just and fair to direct that no further proceedings for the imposition of penalty should be taken and that the petitioner shall be reinstated in service and that the period from the date of his dismissal till the date of his reinstatement shall be treated as period spent under suspension by way of penalty. The petitioner will not, however, be entitled to

any monetary benefit or compensation for the entire period spent under such suspension though he would be treated as having continued in service throughout without any break for all other purposes.

11.Mr. Parikh has further relied on the decision of this Court in the case of *Sattuji Babaji V/s. State of Gujarat and another, 1986 G.L.H. (U.J.) 46* wherein the Court has observed that there are different kinds of punishments with different degrees of severity depending upon different degrees of gravity of misconduct. The Disciplinary Authority and Appellate Authority are expected to consider as to whether any lesser punishment could have served the ends of justice and of the administration and also maintenance of discipline and good conduct in the police service. The Court has also observed that even if the punishment was required to be enhanced, the punishment of

removal would not necessarily be justified especially more so when the Disciplinary Authority was satisfied that the punishment of reduction in pay for two years would meet the ends of justice.

12.Mr. Parikh has further submitted that it is true that law has undergone changes subsequently. However, the Court's power to substitute the punishment can certainly be exercised in appropriate cases and necessary directions be given to the authorities. In support of this submission, he relied on the decision of the Hon'ble Supreme Court in the case of *D.C. Chaturvedi V/s. Union of India and Others, 1995 (6) S.C.C. 749* wherein the Hon'ble Supreme Court has observed that High Court too can exercise power of review, which inheres in every Court, not to speak of a Court of plenary jurisdiction like a High Court. Of course, this power is not as wide as which the Supreme

Court has under Article 142. That, however, is a different matter. If the power of modification of punishment/penalty were to be available to the Supreme Court only under Article 142, a very large percentage of litigants would be denied this small relief merely because they are not in a position to approach the Supreme Court, which may, inter alia, be because of the poverty and the persons concerned. The Court has further observed that a High Court would be within its jurisdiction to modify the punishment / penalty by moulding the relief. In a case of a dismissal, Article 21 gets attracted, and, in view of the interdependence of fundamental rights, the punishment/penalty awarded has to be reasonable; and if it be unreasonable, Article 14 would be violated. If Article 14 were to be violated a High Court can take care of the same by substituting, in appropriate cases, a punishment deemed reasonable by it.

13.Mr. Parikh has lastly relied on the decision of this Court in Special Civil Application No. 2811 of 1985 decided on 31.01.1997. It was a case of co-delinquent against whom the Charge-sheet was issued and he was also dismissed from service. The Court has considered the entire case law on the subject and considering the facts of the case, has come to the conclusion that the penalty imposed upon the delinquent was shockingly harsh and disproportionate. The Court has further observed that whether a reasonable employer would have thrown such a person out of service. Even if the conduct of the delinquent can be considered to be such that he was not required to be continued in service, in the facts and circumstances narrated above, the order of compulsory retirement would have met the ends of justice and that would have achieved the object of keeping the delinquent out of service and at

the same time, would not have deprived the delinquent of the retiral benefits accruing after 32 years of service. The Court has, however, made it very clear in para 13 of the judgment that in the facts and circumstances of the case, especially when the impugned order was passed in the year 1984 and the order was being set aside after 12 years and the delinquent has already expired during pendency of the petition and his widow was merely awaiting payment of the retiral benefits which would have otherwise accrued to the delinquent upon setting aside the order of removal, it was in that exceptional and rare case the Court should itself pass an order for substituting the penalty by an order of compulsory retirement.

14.Mr. Parikh has further submitted that though this case governs the field, the petitioner in that case expired and hence, there was no

question of reinstatement. However, in the present case, the petitioner is now 52 years old and 7 or 8 years are still to go and in that case, the order of reinstatement be passed.

15.Mr. Parikh has lastly submitted that the decision of the Hon'ble Supreme Court in the case of *Bharat Forge Co. Limited V/s. Uttam Manohar Nakate, 2005 (1) Scale 345* is distinguishable on facts as in that case, the Hon'ble Supreme Court has taken into consideration the alleged misconduct, the past conduct as well as his conduct during the domestic inquiry proceedings and in that view of the matter, the Hon'ble Supreme Court has taken the view that the quantum of punishment imposed upon the respondent was not wholly disproportionate to his act of misconduct or it was not otherwise arbitrary.

16.Mr. Parikh has further submitted that so far as the present case is concerned, there was no past history of any lapse or misconduct and neither any charge was levelled against the petitioner nor any action was taken. He has co-operated during the course of inquiry. He has given his explanation. Because of the circumstances beyond his control, he could not give reply to the second show-cause notice and hence, none of the circumstances which were present in the case before the Hon'ble Supreme Court, are present in this case and hence, the ratio of the said decision could not be made applicable to the facts of the present case. He has, therefore, submitted that the order of dismissal passed by the Disciplinary Authority and the order of removal passed by the Standing Committee be quashed and set aside and the petitioner may be reinstated with back wages.

17.After having heard learned advocates appearing

for the parties and after having gone through the orders passed by the Disciplinary Authority as well as the Appellate Authority and after having considered the submissions made by Mr. Parikh and the authorities relied upon by him in support of those submissions, the Court is of the view that the only charge levelled against the petitioner was that he was found sleeping during the course of his duty. The authorities have proceeded on the footing that he has admitted the charge. However, mere assertion of fact does not amount to admission. Only the fact was stated and on that basis, the Disciplinary Authority has committed an error to arrive at the conclusion that no further inquiry was necessary in the order. On the basis of the decided case law and looking to the seriousness which is attached to the order of dismissal, the Court is of the view that the dismissal order passed against the petitioner is quite disproportionate to the charge

levelled against him. In his entire career of about 13 years of service, this was the only charge and that too for a particular moment. However, on that basis, it cannot be assumed that he was sleeping all the time while he was in service. At the most, it was the case of negligence. Showing such negligence, the dismissal order could not have been passed.

18.It is also worthwhile to mention here that the order of dismissal was passed in 1984. More than 21 years have passed. The petitioner is jobless for all throughout. He is at present at the age of about 52 and still, 8 years are to go. The Court is conscious about the fact that the Hon'ble Supreme Court has taken the view in the case of Bharat Forge Co. Ltd. (Supra) where the delinquent was found sleeping during his duty and dismissal order was passed. The Court has taken into consideration three aspects. However, in the present case, there

was no such past misconduct or no allegation of non-co-opeartion which requires the Court to take such harsh view in the present matter. It is also important to note that after more than 21 years, it is not advisable to remand the matter back to the Disciplinary Authority for considering quantum of punishment afresh. The other alternative available with the Court is to substitute the punishment. Having regard to the facts and circumstances of the case, the Court is of the view that the interest of justice would better be served if the course adopted by this Court in the case of *Bhimsing Sardarsing V/s. District Supdt. Of Police & Ors., [1982] 23 (2) G.L.R. 410,* is adopted in the present case, as in that case also, while quashing and setting aside the order of termination, the Court has taken the view that the the period from the date of his dismissal till the date of his reinstatement shall be treated as period spent under suspension by way

of penalty. Accordingly, in the present case also, the Court hereby quashes and sets aside the orders of dismissal and/or removal and the respondent – Corporation is hereby directed to reinstate the petitioner within one month from the date of receipt of the writ of this Court or certified copy of this order, whichever is earlier and the period from the date of his dismissal and/or removal till the date of his reinstatement shall be treated as period spent under suspension by way of penalty. It is made clear that the petitioner will not, however, be entitled to any monetary benefit or compensation for the entire period spent under such suspension though he would be treated as having continued in service throughout without any break for all other purposes.

19. Subject to the aforesaid direction and observation, this petition is accordingly allowed to the above extent. Rule is made

absolute to the above extent without any order as to costs.

[K.A. PUJ, J.]

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